No. 11768

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TREASURE COMPANY, a corporation, and SAMARKAND OIL COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

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Questions Presented on This Appeal.

Appellee declares that the first question presented on this appeal is whether the District Court of the United States, which has acquired jurisdiction over property by the institution of condemnation proceedings, has jurisdiction to enjoin temporarily the prosecution of actions subsequently brought in the state court to recover such property or damages for its withholding.

An action for the condemnation of land only was commenced by the filing of the original complaint on September 28th, 1942, at which time a declaration of taking of land was filed, and on the same day Judge Beaumont

signed an order for immediate possession of land. [R. pp. 14 to 19.]

The United States Marshall purporting to act under such order unlawfully delivered the personal property and equipment situated on the land to Union Oil Company of California, a corporation (hereinafter called Union Oil Company), without any authority so to do. On the same day, September 28th, 1942, the Union Oil Company wrongfully, and without any right, took possession of said personal property and equipment and thereafter continuously and until January 12th, 1944, wrongfully held possession thereof. [See Judge Palmer's Findings of Fact and Conclusions of Law in case No. 948-319, of the Superior Court of the State of California, in and for the County of Los Angeles, R. pp. 138-9.]

A so-called amended complaint in condemnation was filed on January 12th, 1944, whereby it was sought for the first time to condemn the equipment and personal property belonging to the appellants, and situated upon the land described in the original complaint in condemnation. [R. pp. 37 to 46, incl.] No Declaration of Taking, or Decree of Taking was ever made or entered in reference to the equipment, or personal property sought to be condemned by such amended complaint.

On September 27th, 1945, the appellants filed separate actions in the Superior Court against the Union Oil Company alone, to recover possession of certain of the personal property consisting of oil well equipment, or for its value, and for damages for withholding. [R. p. 125.]

The United States District Court not having acquired jurisdiction of the personal property until some fifteen months after the wrongful taking of the personal property consisting of tools and equipment by the Union Oil Company, the first question must be answered in the negative, as no recovery can be had in the condemnation action for the deterioration or rental value of the personal property while it was unlawfully in the possession of the Union Oil Company, from September 28, 1942, to January 12, 1944.

From this it follows that the second question suggested by the appellee, namely, did the District Court err in refusing to set aside the order restraining the prosecution of the State court actions pending the determination of the condemnation proceedings must be answered in the affirmative.

ARGUMENT.

I.

Section 265 of the Judicial Code Forbids the District Court Enjoining State Court Actions, Even Though the Injunctive Relief Is Sought by the United States, Unless the Rights of the United States Cannot Be Otherwise Protected.

Neither the United States, nor any of its agencies are parties defendant to the State court actions, and therefore no rights of the United States can be said to be involved in those actions.

Even though it be assumed that the District Court acquired jurisdiction of personal property by the filing of the amended complaint on January 12, 1944 (but it did not because there was never any Declaration of Taking, or Decree of Taking, made or entered in respect thereto), any award for the taking of such personal property must be limited to the value of such property on January 12, 1944.

This personal property has been subjected to the elements for over six years, now, resulting in great deterioration in its value, and much of it has been removed from the premises entirely. In this connection it is to be noted that Judge McCormick in his opinion rendered June 12, 1945, denying the injunction restraining the prosecution the prior similar state court actions, said,

> "It is apparent that no recovery could be had in the State court actions, except by way of money judgment against the Oil Company." [R. p. 63.]

Under these circumstances the United States cannot be harmed by permitting the State court actions to proceed to judgment against the Union Oil Company.

It is contended by the appellee that Section 265 of the Judicial Code does not apply to petitions by the United States for injunctive relief.

The only case cited by the appellee which involved an application by the United States for injunctive relief is that of the *United States v. De War,* 18 Fed. Supp. 981. The other cases cited by appellee in this connection involved the question of the exemption of the United States from the operation of certain Federal statutes.

In the light of the facts presented in the present case *United States v. De War, supra,* favors appellants rather than the appellee. In that case the United States commenced an action in the Federal Court to enjoin the prosecution of an action in the State court whereby the plaintiff in the State court action, the defendant in the Federal Court action, sought to enjoin Brooks, the Regional Grazer, from collecting a license fee as a condition precedent to the granting of grazing permits, which it was contended was in excess of the power conferred on the Secretary of the Interior by the act of Congress. The court pointed out that the Federal Court could not assume that the State court would erroneously construe a Federal statute, nor erroneously determine the question of whether the United States was a necessary party to the action. The Court in holding that under the circumstances the Federal Court would not enjoin the State court actions, because it did not appear that the rights of the United States could not be otherwise protected, said at pages 983-4:

> "While the statute cited *supra,* respecting the issuance of injunctions against proceedings in state courts, does not apply to cases where the United States is a party plaintiff in a suit to enforce the rights of the United States, nevertheless an injunction will not issue in such a case unless such rights

> otherwise could not presently be protected. This is not a case within recognized limitations justifying the issuance of a writ of injunction. United States v. Bank of New York & Trust Co., 296 U. S. 463, 479, 56 S. Ct. 343, 348, 80 L. Ed. 331; Wells Fargo & Co. v. Taylor, 254 U. S. 175, 41 S. Ct. 93, 65 L. Ed. 205; Russell v. Detrick (C. C. A.) 23 F. (2d) 175; Hammond Hotel & Improvement Co. v. Finlayson (C. C. A.) 6 F. (2d) 446."

We have been unable to find any case in which a State court action was enjoined upon the application of the United States, and as was held in the *De War* case, the statutory exceptions to Section 265 of the Judicial Code should not be extended by judicial construction, unless absolutely necessary for the protection of the rights of the United States.

The leading case on the construction of Section 265 of the Judicial Code is that of *Tousey v. New York Life Insurance Company*, 86 L. Ed. 100. In that case the court in pointing out that the only exceptions which have been implied in respect to Section 265 of the Judicial Code, is the one in respect to the *"res"* cases, said at page 108:

> "We find, therefore, that apart from congressional authorization, only one 'exception' has been imbedded in Section 265 by judicial construction, to wit, the *res* cases. The fact that one exception has found its way into Section 265 is no justification for making another."

This clearly indicates that the fact that the United States is the applicant for injunctive relief is not a factor to be considered in determining whether the injunction should be granted.

We conclude that the injunction in this case cannot be justified upon the grounds that the applicant was the United States.

II.

The State Court Actions Are Actions in Personam Rather Than Actions in Rem, and the Injunction Should Not Have Been Granted.

The appellee contends that the injunction was proper because the State court actions were actions *in rem,* aside from the fact that the applicant was the United States.

If the State court actions are primarily actions *in personam* the injunction was improperly granted, for there would be no conflict of jurisdiction. This is pointed out in *Tousey v. New York Life Insurance Company, supra,* wherein the court states at page 106:

> "The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam,* involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

Appellee states at page 8 of its brief:

> "While the complaints filed in these actions are not in this record, the Government's petition for injunction alleged [R. 71, Pars. IX, X] that they were 'for the possession of the personal property (or its value in damages for withholding),' an allegation admitted by appellants' answer [R. 125-126, Par. IX, X]."

While this is a correct description of the designation of the State court actions set forth in the Government's petition for injunction, it is not a correct description of the

designation of the State court actions set forth in appellants' answers, for that is as follows:

> "Admit that Sarmarkand Oil Company, a corporation, filed action number 505-968 in the Superior Court of the State of California, in and for the County of Los Angeles, for the recovery of a portion of said personal property described in said inventory or for its value, and for damages for its withholding. * * *" [R. p. 125.]

The language used in the answer for the description of Treasure Company's action No. 505-967, is the same.

It thus appears that the actions are for the possession of personal property, or its value, and for damages for withholding, but not for the possession of personal property (or its value in damages for withholding), as stated by the appellee.

In other words, the State court actions were for possession of the property or its value, not for possession or damages for withholding, as appellee's statement would indicate.

It is apparent, therefore, that the State court actions are not strictly actions *in rem,* but are what are termed mixed actions. In *Fredericks v. Tracey,* 98 Cal. 658, the court in discussing the dual nature of actions for the recovery of personal property, or for damages for its value if recovery cannot be had, said at pages 659 and 660:

> "Plaintiff had judgment as before stated.
>
> The question is, Did the complaint state facts sufficient to constitute a cause of action? Replevin (claim and delivery) is an action at law for the recovery of specific personal chattels, wrongfully taken and detained, or wrongfully detained, with damages which the wrongful taking or detention has oc-

> casioned. It is what we usually term a mixed action, being partly *in rem* and partly *in personam—in rem* so far as the specific recovery of the chattels is concerned, and *in personam* as to the damages."

The same rule is announced in *Dewing v. Thompson,* 19 Cal. App. 85, in which case the court said at page 88:

> "An action in claim and delivery has two aspects: In one it is a suit to recover specific personal property. In the other it is a suit to recover a money demand, and as such the amount demanded exclusive of interest is the test of jurisdiction."

In *Claudius v. Aquirre,* 89 Cal. 501, the plaintiff brought an action in claim and delivery, and obtained possession before the entry of judgment. By the terms of the judgment the plaintiff was awarded possession of the property, without damages. The defendant appealed because the judgment did not provide for the recovery of the value of the property. However, the court in holding that judgment for possession alone, if possession has been recovered before the entry of judgment, or judgment for the value of the property alone, if recovery of possession has not been had before trial, are equally valid said at pages 504, 504-505 and 505:

> "2. Section 667 of the Code of Civil Procedure declares that 'in an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof in case a delivery cannot be had, and damages for detention.'
>
> * * * * * * * *
>
> "Under the provisions of section 627 of the Code of Civil Procedure, in an action for the recovery of specific personal property the jury are authorized to find the value of the property, if their verdict be in

favor of the plaintiff, only 'if the property has not been delivered to the plaintiff,' and, *e converso*, if the property has been delivered to the plaintiff, they are not required to find the value; and in the absence of such finding, there is no verdict upon which to base an alternative judgment."

* * * * * * * *

"We can see no difference in principle between a judgment for the value of the property sued for, without the alternative for its delivery, and a judgment for the delivery of the property without an alternative for its value. If the former is free from error, the latter must be equally so."

The rule thus announced was approved in *Webster v. Mountain Monarch Co.,* 6 Cal. App. (2d) 450 at 454.

It appears, therefore, that the court in the State court actions may render a money judgment in favor of the plaintiffs therein, whereby plaintiffs will receive all of the relief to which they are entitled, such plaintiffs not having received possession of the property, without interfering with the jurisdiction of the District Court in the condemnation action.

Particularly is this true, in view of the fact that the prayer of the respective complaints in the State court actions are in the alternative, namely, for the possession of the property, or, if possession cannot be had, then judgment for money for its value.

The contention of the appellee that the decision in *Brooklyn Trust Company v. Kelly,* 134 F. (2d) 105, sustains the conclusion that the claim for a money judgment in the State court actions is *quasi in rem* is untenable.

In the *Brooklyn* case the Brooklyn Trust Company, as a testamentary trustee under a trust created by the will

of one Coffin, brought an action in the New York State court against one of the old trustees for a series of bonds issued by the debtor Prudence Bond Company, to compel the old trustee to replace certain securities which the old trustee had wrongfully permitted the debtor to withdraw from the trust estate. The new corporation created as a successor to the original debtor, as well as two of the bondholders, were made parties defendant in such action.

Theretofore the Prudence Bond Company had filed a petition for reorganization, under Paragraph 77 of the Bankruptcy Act. On July 12, 1939, the court in bankruptcy made an order declaring that it had taken full jurisdiction of all restoration actions, and restraining all State court actions, and referring all claims to a special master.

Upon the commencement of the State court action the bankruptcy court enjoined the prosecution of the State court actions. The Brooklyn Trust Company took an appeal from this order, and contended that the injunction was improperly issued because only a money judgment was sought against the defendant trustee. The court in rejecting this contention said at page 115:

> "If, as Brooklyn argues in its briefs here, its purpose as plaintiff in the state court action was merely to obtain a money judgment against Manhattan and in no way to interfere (except such interference as might result via the Erie R. Co. v. Tompkins doctrine) with the action against Manhattan in the bankruptcy court, then Brooklyn's joinder of the new company and those two bondholders is inexplicable."
>
> * * * * * * * *
>
> "No harm to the Coffin estate could conceivably come about from the federal action if all that Brooklyn wanted in its suit were a money judgment against Manhattan. It is plain beyond a doubt that what

> Brooklyn seeks is a decree by the state court against the new company and the two bondholders—a binding, judicial determination, *quasi in rem,* of their status, to the effect that they have no right to assert in the action pending in the federal court any claim on behalf of present or future bondholders for restoration by Manhattan to the corpus of the trust fund on account of wrongs done by Manhattan while Mrs. Coffin or her estate was still a bondholder. Clearly, such a judicial determination by the state court would seriously interfere with the jurisdiction of the bankruptcy court in the restoration action against Manhattan.
>
> * * * * * * * *
>
> "The injunction order was proper solely because of the nature of the relief sought in the state court suit and of the nature of the action against Manhattan pending in the bankruptcy proceedings."

In holding that the power to compel a trustee to restore trust funds was a remedy *in rem,* the court said at page 111:

> "The exercise of the court's power to compel such an old trustee to restore trust assets, lost by its negligent conduct, concerns the *res* itself and is, therefore, *quasi in rem.*"

It was under such circumstances that the court used the language quoted by Judge McCormick, and relied upon by the appellee here, to the effect that it is not true that a money claim *in personam* cannot be a *"res."*

It is clear from the foregoing that if the Brooklyn Trust Company had only sought a money judgment against the trustee the injunction would not have been granted.

Moreover, if the personal property described in the State court actions is now in the possession of the United

States, the United States not being a party to the State court actions, recovery of the possession of the personal property cannot be secured by the plaintiffs in the State court actions.

As above indicated Judge McCormick found that no relief but a money judgment could be recovered by the plaintiffs in the State court actions. It necessarily follows that the injunction restraining the prosecution of the State court actions should not have been granted and the court exceeded its jurisdiction in so doing.

III.

The Court Abused Its Discretion in Refusing to Dissolve the Injunction.

The appellee practically concedes that if the property described in the complaints in the State court actions was in fact personal property, and therefore not subjected to the jurisdiction of the District Court by virtue of the filing of the original complaint on September 28, 1942, the injunction should have been dissolved, but contends that the trial court did not determine whether the property described in the State court actions was real or personal property, and that such question cannot be determined by this court upon this appeal.

This contention entirely overlooks the affidavit of G. de Brettville filed in support of appellants' motion to vacate the injunction, the material part of which is as follows:

> "The Plaintiffs in said Superior Court actions seek to recover from said Union Oil Company certain oil well drilling and operating tools, equipment and supplies, including galvanized tanks, loading racks, bolted steel tanks, pipe lines, steel stairway, gauges, valves,

nipples, gate valves, electrically power driven pumping plant, sucker rods, jump pump, dehydration tank, trumble gas trap, water lines, gas pipe lines, unitized heavy duty surface hoist, two cylinder American compressor, 7½ ton ice machine complete, several hundred feet of tubing, none of which items are or at any time were embedded in the land or permanently resting thereon, or permanently attached to that which is embedded in or permanently resting on the land by means of cement, plaster, nails, bolts or screws.

That the tubing above referred to is not embedded in the land but is temporarily placed inside of the metal casing which is surrounded by cement and which casing and cement serve to hold back the adjacent earth thereby forming and maintaining the hole in which the removable metal tubing is placed and in which tubing the sucker rods are in turn placed and upon the end of which sucker rods the pump is attached which forces the oil to the surface of the earth.

All of the above described items and all of the items described in the complaints in the respective state court actions, above referred to, except said casing which is not sought to be recovered in said state court actions, are readily removable and in good oil well drilling practice are from time to time moved from one well to another as drilling operations may require without injury to any of such items sought to be recovered in said state court actions or to the real property.

That by the terms of the lease and sublease under which Treasure Company and Samarkand Oil Company were in possession of the (159) land sought to be condemned in the above entitled action the lessee and sublessees are granted the right to remove from said land during the term of said lease and subleases

and at any time within three months after the expiration or other termination thereof all derricks, machinery, rigs, pipe, pumping stations and other property and improvements belonging to or furnished by the lessee or sublessees." [R. pp. 183-185.]

No evidence was offered in contradiction of this affidavit and therefore this court must take it to be true. There was no opinion written by the trial court either in connection with the granting of the injunction or the denial of motion to vacate the injunction. Therefore, it cannot be said that the trial court did not accept this affidavit to be true.

It appears from the affidavit of Mr. de Brettville that it is not sought in the State court actions to recover compensation for the casing in the well, the retention of which in the well is essential to the continued existence of the well.

In *United Natural Gas Company v. James Brothers Loan Company,* 191 Atl. 12, the court held oil well equipment and appliances to be trade fixtures.

The same rule is stated in *Brazos River District v. Adkinson,* 173 S.·W. (2d) 294, in which the defendant District filed a cross-complaint in condemnation. See discussion of this case and its applications to the present case at pages 46-50, inclusive, of our opening brief.

It is to be noted that by the original complaint in the condemnation action it was only sought to condemn land without any reference to any improvements or equipment situated thereon. [See original complaint, R. p. 7; order for immediate possession, R. p. 14; the declaration of taking, R. p. 20, and the decree on declaration of taking, R. p. 31.]

In *People v. Church,* 57 Cal. App. (Supp.) 1032, the plaintiff which was the condemnor in a prior action, brought the instant action to recover possession of certain gasoline pumps, which were attached to underground tanks by means of pipes, which were screwed into the tanks at one end and into the pumps at the other, and to recover possession of an automobile hoist which rested on a cement base, some six feet under the ground.

The complaint only sought to condemn land, having made no reference to any equipment located thereon. The court in holding that the defendant had not been compensated in the condemnation action for such equipment as would have a substantial value disconnected from the premises, said at page 1055:

> "And as was held In re Acquiring Property on North River, 103 N. Y. S. 908, while in condemning for street purposes land improved with a building erected for a factory it is incumbent on the city to pay for such machinery as has become a part of the building, not even the tenant can require it to pay for such machinery as can be readily removed, and will have a substantial value disconnected from the building. If that be true it is manifest that the condemnor cannot compel the tenant to leave such machinery on the premises."

It is clear from the affidavit of Mr. de Brettville that the equipment described in the State court actions had a substantial value disconnected from the oil well in connection with which it was being used at the time of the commencement of the condemnation action, on September 28th, 1942, and therefore would receive no compensation for it in the condemnation action, as it originally sought to condemn land only.

It is finally contended that the injunction was properly granted because Defense Plant Corporation entered into a contract of employment and indemnity with the Union Oil Company, whereby it agreed to save Union Oil Company harmless from and against all claims on the part of third persons resulting from the condemnation, taking or acquisition of the *site,* or any portion thereof, or possession or occupancy thereof by Union Oil Company under its said agreement of employment by said Defense Plant Corporation. [See R. p. 75.]

At the outset it is to be noted that the indemnity feature of the contract, according to the allegations in the petition for injunction, relates only to damages arising from the condemnation, taking or acquisition of the site, and does not extend to claims for damages arising from the condemnation, taking or acquisition of any personal property or equipment which might have been situated thereon.

Further it is to be noted that this contract between Defense Plant Corporation and Union Oil Company was not entered into until August, 1943. [See opinion of Judge McCormick, R. p. 53.] In view of this fact it is clear that neither Defense Plant Corporation nor the United States would be liable to indemnify Union Oil Company for any claims against the Union Oil Company arising from the taking, condemnation or acquisition of the personal property described in the State court actions (or any other property for that matter) on September 28, 1942, and its subsequent detention prior to the execution of the indemnity contract in August, 1943, even assuming it covered personal property.

Neither is the United States entitled to have the question of its liability to Union Oil Company under such indemnity agreement determined in the Federal Court before

the liability of the Union Oil Company to the appellants is determined in the State court actions. This is pointed out in the case of *Lincoln Mutual Casualty Company v. Spencer,* 47 Fed. Supp. 802. In that case the plaintiff insurance company sought an injunction in the Federal Court to restrain the prosecution of an action in the State court, by which Mang sought to recover damages from Spencer, it being contended by the insurance company that it was entitled to have its liability to Spencer under the policy determined in the Federal Court before the trial of the action against Spencer in the State court. In rejecting this contention the court said at page 803:

> "Obviously, the case at hand is not within any of these recognized exceptions, and furthermore, adhering to the language of Justice Frankfurter in the Toucey case, *supra,* to wit: 'We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation', these exceptions should not be enlarged unless it appears necessary."

If it be said that the rule thus announced in *Lincoln Mutual Casualty Company v. Spencer, supra,* is not applicable to the present case because the United States was the applicant for injunctive relief, we submit that in accordance with the rule laid down in *United States v. De War, supra,* it must be assumed that the State court will properly determine the question of the liability of the Union Oil Company to the appellants herein, upon which liability the secondary liability of the United States, to Union Oil Company, if any (and under the circumstances above outlined we fail to see how there could be any such liability), would be dependent, and therefore the injunction should not have been issued, but having been issued should have been dissolved.

The Court in *United States v. De War, supra,* pointed out that the case did not involve any question of direct injury to the United States by way of trespass, and in holding that under the circumstances the Federal Court would assume that the State court would properly determine whether the rule promulgated by the Secretary of the Interior was a valid exercise of the power conferred by the Congress, said at page 983(B):

> "Assuming, solely for the purpose of the question under consideration whether this is a case within an exception to the general rule, that a federal court will not issue an injunction to prevent the prosecution of a case pending in a state court, that the said rule of the Secretary of the Interior, which is the basis of both suits, is in fact a valid exercise of power conferred by Congress rather than a usurpation of power not so conferred as, in effect, alleged by the plaintiffs in the state suit, can this court now assume that the state court will erroneously decide the question when presented to that court? We think it clear that this court cannot so assume."

That no entanglements would result from permitting the State court's action to proceed to judgment is apparent from a separate consideration of each of the following five possible eventualities, namely:

1. If a Federal Court holds that the personal property was never lawfully taken, no judgment in condemnation would ensue;

2. If the Federal Court finds that there was no lawful taking of personal property prior to the filing of the amended complaint, it could not award damages accruing prior to such time;

3. If the Federal Court finds the taking to be lawful and such judgment follows the judgment of the State court against the plaintiff, the plaintiff in the State court action would be entitled to recover in the Federal Court action;

4. If prior to the Federal Court judgment the State court found for the plaintiff and such judgment was paid or satisfied on execution the Union Oil Company would be entitled to recover the value of the property in the condemnation action;

5. If the State court found that the unlawful taking became lawful upon the filing of the amended complaint the State court could award plaintiff damages accrued up to the time of the filing of the amended complaint, in which case the plaintiff in the State court action would be entitled to recover in the condemnation action the value of the property, or the court might give the plaintiff judgment for the entire value of the property, in which case the Union Oil Company would be entitled to recover the value of the property in the condemnation action.

In each instance assumed under the fifth subdivision the award by the Federal Court would be based upon the value of the property at the time the taking first became lawful. By such procedure the Union Oil Company would properly be required in either event to compensate the owners for the wrongful detention of the property. We thus see that no entanglement of status would result from the two trials.

It is further to be noted that Judge McCormick found that any contention on the part of the government, that it was originally intended to condemn personal property, was an afterthought to avoid the possible consequences of the seizure of September 28, 1942. [See R. p. 61.]

The following appears at the bottom of page 12 of the appellee's brief:

> "Appellants believe that in the state courts they would recover more than just compensation. Their counsel told the court below that 'we could recover a larger judgment * * * in the State court'." [R. p. 236].

Have not appellants the right to recover the full amount of their damages?

If under the peculiar circumstances of the case, full damages cannot be recovered in the District Court are appellants to be criticized for seeking relief in the State court?

It was held in *United States v. Block,* 160 F. (2d) 604, that the value of the property taken in a condemnation action must be determined as of the date of the first lawful taking.

The full statement of counsel for appellants above referred to is as follows [quote R. p. 236]:

> "But the gist of this, if your Honor please, and the reason they are so vigorously opposing it is this: In an action in the State Court we have a right to recover the reasonable value of the property at the time it was taken, together with reasonable rental value so long as it was unlawfully withheld, and oil property, oil drilling equipment and tanks and things like that have a very high rental value, so that so far as we are concerned we could recover a larger judgment there for that damage than if we were to go in and say—(50)
>
> The Court: You say you could recover it there; where do you mean?
>
> Mr. Bodkin: In the State Court.

The Court: It would be to your advantage to try it in the State Court?

Mr. Bodkin: It would be to our advantage to try it in the State Court, certainly. And we feel if we have that lawful right we should be permitted to use that lawful right."

Conclusion.

In view of the facts above set forth, it is clear that the trial court abused its discretion in granting the injunction restraining the trial of the State court actions and in refusing to vacate such injunction. Hence, the order denying the motion to vacate the injunction should be reversed.

Respectfully submitted,

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